not exempt. The assignee garnisheed the railroad in Michigan for the wages owed to the debtor. The Michigan court applied the exemption laws of Indiana on the grounds (1) that interstate comity would not permit a state to allow its courts to be used for the purpose of evading the laws of a sister state; (2) that when all the parties at the time of the creation of both debts reside in the same state the exemption laws of that state become an incident of the debt and a vested right in rem which follows the debt wherever it is considered to be situated. Other cases holding the same views are, *Macon* v. *Beebe,* 44 Fed. 556; *Ill. Cent. Ry.* v. *Smith,* 70 Miss. 344, 35 Am. St. Rep. 651; *Wright* v. *Chicago etc. Ry.,* 19 Neb. 175, 56 Am. Rep. 747; *Pierce* v. *Chicago etc. Ry.,* 36 Wis. 283; *Mo. Pac. Ry.* v. *Skarritt,* 43 Kans. 375; *Singer Mfg. Co.* v. *Fleming,* 39 Neb. 679, 23 L. R. A. 210, 42 Am. St. Rep. 613.

In some of these cases, as in most of the cases cited by them, the question of the extraterritorial effect of exemption laws is confused by the different views formerly held by the courts as to the situs of debts for the purposes of garnishment, a question which was settled by *Harris* v. *Balk,* supra. But in all of them the principle of comity is recognized with reference to exemption statutes. In all of these cases, however, the parties were both citizens of a state other than the forum and there was evidently an attempt to evade the laws of that state. In none of them was the law of another state enforced against a citizen of the forum. But in the principal case the creditor and garnishee were both citizens of the forum, Missouri. There was no attempt to evade the laws of another state, as the proceeding was brought in the logical court. There was no argument that the exemption law was a part of the debt itself. The court therefore applied the law of a foreign state relating to a remedy against the interest of one of its own citizens. It is believed that few if any courts have gone as far as this in recognizing the exemption laws of another state. The authorities do not sustain any such holding although the language in *Mason* v. *Beebe,* supra, is broad enough to cover the present case.

But however weak the case may be on authority, it suggests a solution to the difficulty into which the former doctrine has led the courts. The decision in *Harris* v. *Balk* has made the effect of ignoring the exemption laws of a sister state much more serious to that state than was formerly the case. Although among sovereignties the rule undoubtedly is that laws relating to remedies have no extraterritorial effect, yet in international law there is no full faith and credit clause, and a sovereign state need not recognize a foreign judgment that violates its public policy. This is not true among the states of the Union. The Missouri court evidently thinks that the principle of comity should not be confined to those classes of laws to which it is applied among sovereign states. P. B. B., Jr.

LIABILITY OF TESTATOR'S ESTATE FOR LIBEL CONTAINED IN HIS WILL.—It has frequently been said that the law of wills is so well developed that in examining cases involving that subject, one scarcely, if ever, meets with a case for which there is not somewhere a precedent. In *Harris* v. *Nashville Trust Company* (Tenn. 1914) 162 S. W. 584, which was a case involving a will, there

arose a question which, so far as the writer has been able to find, has never before been considered. The case is interesting not only because of the decision reached, but also because it is another example of the courts' attempting to apply settled principles of law to new exigencies as they arise.

The will contained matter which was libelous per se in that it designated some of the legatees as illegitimate children. The libel was published by the executor in probating the will, and the action for damages was brought against him by one of the legatees. In deciding the case the court arrived at a number of conclusions which deserve brief mention.

The Statute of Tennessee which provides that no actions shall abate because of death save those for wrongs affecting the character of the plaintiff, SHANNON'S CODE, § 4569, does not change the common law rule with respect to the class of actions to which the one in the present case belongs, *Hambly* v. *Trott,* 1 Cowp. 371. If then the rule that "actio personalis moritur cum persona" were applicable to this case, the decision obviously would have been that upon the death of the testator the action abated. But the libelous act was never completed in the lifetime of the testator. The publication of the libel, which was necessary to its completion as a tort, was not consummated until his death; and so, since no cause of action arose during his lifetime, the court concluded, logically, it seems, that the above rule did not apply, and that the action did not abate upon the testator's death. The court also concluded that since it was the duty of the executor to probate this will, the failure of the performance of which duty would result in his being criminally accountable, *Smith* v. *Harrison,* 2 Heisk. 230; SHANNON'S CODE, § 6565, the executor should not be held to any liability for the publication of the libel. This conclusion, too, is reasonable. Finally the court concluded that there existed between the testator and the executor a relationship of agency, that the executor in publishing the will was acting as the agent of the testator, and therefore the court decided that the testator's estate, which was the estate of the principal, should respond to the plaintiff for damages.

This last conclusion is absolutely illogical, indeed, so much so, that it approaches absurdity. How can it be said that the death of the testator resulted in the executor's being constituted his agent? What authority is there for saying that death can create an agency? The general rule is that death terminates the agency relationship, *Hunt* v. *Rousmanier's Adm'rs,* 8 Wheat. 174. There are some exceptions to this rule, *Nicolet* v. *Pillot,* 24 Wend. (N.Y.) 240; *Durbrow* v. *Eppens,* 65 N. J. Law 10, 46 Atl. 582; *Garrett* v. *Trabue,* 82 Ala. 227; but it is not asserted that there ever existed any such relation in the lifetime of the testator, and therefore the court could not have understood that this case came within one of the exceptions to the general rule. During the so-called principal's life there never existed any agency relationship to be terminated or not to be terminated by his death.

In *Davis* v. *Lane,* 10 N. H. 156, in which it was held that as a general rule the authority of an agent is terminated by the insanity of the principal, the court used the following language: "An authority to do an act for and in the name of another pre-supposes a power in the individual to do the act himself, if present. The act to be done is not the act of the agent, but the act of the

principal; and the agent can do no act in the name of the principal which the principal might not himself do, if he were personally present. The principal is present by his representative. * * * * But it would be preposterous, where the power is in its nature revocable, to hold that the principal was, in contemplation of law, present, making a contract, or acknowledging a deed, when he was in fact lying insensible upon his death bed, and this fact well known to those who undertook to act with and for him. The act done by the agent, under a revocable power, implies the existence of volition on the part of the principal. He makes the contract—he does the act. It is done through the more active instrumentality of another, but the latter represents his person and uses his name." How much more preposterous is it to conceive of a man's committing a tort when he is in his grave?

In *Moore* v. *Weston,* 13 N. D. 574, 102 N. W. 163, the court expressly held that an attempt to create an agency to become effective at the death of the principal is nugatory. In that case there was a memorandum upon the back of a note which provided that if it were not paid before the payee's death, the maker should expend the balance due, for funeral expenses and monument for the payee. It was held that the maker was the agent of the payee to carry out the provisions of the memorandum after his death, but that the agency never became operative as *the death terminated the authority which purported to create it.*

The executor is not an agent of the testator. He is a principal himself. He is part of an instrumentality which the law has provided to carry out the testator's will. It cannot be denied that the injury done to the plaintiff by the publication of the libel was one for which ample damages were justly due. As the court said, the libel will be republished and the plaintiff's character maligned every time the title to any land devised in the will is examined upon the records. And from one point of view the attempt by the court to adopt a seemingly tenable theory which, although it overthrew settled principles of law, would do justice to this particular case, is commendable. But the making of law is for legislative bodies, and any attempts by a court to usurp that function by distorting well-founded principles is inconsistent with our departmental form of government. W. F. S.

THE RULE OF HIGHER INTERMEDIATE VALUE.—What is the measure of damages, upon the conversion of, or breach of contract to deliver, goods of a fluctuating value? This was the interesting and by means settled question involved in the recent case of *Brewer et al.* v. *Neatherly et al.,* 162 S. W. 1185 (Texas), where the defendant contracted to deliver on or before November 20, 1912, two hundred bales of cotton at 10¾ cents per lb. On November 8, defendant gave plaintiff notice that he would not perform the contract; on that day cotton was worth 11⅞ cents, on November 12, it was worth 12 1-6 cents, and still increasing in price and had been so increasing since October 28th. No evidence was given as to the value on November 20, the agreed date of delivery, or as to the value at the time of trial. Plaintiff contended that he was entitled to the difference between the contract price and the value of cot-